IN THE SUPREME COURT OF OHIO

KAREN ANN LUETZOW,	:	**07-0129**
Appellant,	:	On Appeal from the Hamilton County Court of Appeals, First Appellate District
v.	:	
AMERICAN SELECT INSURANCE CO.	:	Court of Appeals Case No. C-060259
Appellee.	:	

MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANT, KAREN ANN LUETZOW

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EXPLANATION OF WHY THIS CASE IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST

This case presents critical issues for the future of Ohio families who purchase and maintain uninsured/underinsured ("UM/UIM") motorist coverage, where the liability insurance policy contains an intra-family exclusion. Families purchase auto insurance policies with the understanding that they will be covered in the event of an accident. However, when involved in an accident with a family member, as the case here, insureds are provided no liability or UM coverage. Further, where a policy provides no specific exclusion to UM/UIM coverage as in this instance, insureds are not put on notice by the insurance carriers that coverage will be denied.

In this case, the court of appeals did not allow UM/UIM coverage where the policy language expressly allowed it. Ohio Courts have interpreted R.C. §3937.18 to allow insurance carriers to contractually limit their exposure by writing specific exceptions into the policy. However, where the insurance carriers have not written specific exclusions into the policy, coverage should not be limited.

Under the policy at issue, an "uninsured motor vehicle" is one "that is a covered automobile for which coverage is provided under Part I of this policy." Under Part I of the policy, Appellant was denied coverage pursuant to an Intra-family exclusion, which reads, "We do not provide liability coverage for any insured: for bodily injury to you or any family member." A family member is defined as "a person related to you by blood, marriage, or adoption who is a resident of your household."

Since the automobile was not provided coverage under Part I of the policy, due to an Intra-family exclusion, the policy specifically allows for UM/UIM coverage. Had the policy in this case stated that an "uninsured motor vehicle" is one "that is a

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covered automobile" under Part I of this policy, there would be no coverage. However, since the policy goes on to say "for which coverage is provided under Part I of this policy," it allows UM/UIM coverage to apply, as there is no coverage under Part I, only a denial based on the Intra-family exclusion.

This case is of great public significance to all Ohioans. Allowing insurance companies to deny coverage, where they have not specifically excluded it under the policy, allows insurance companies to avoid the mandates set out in R.C. §3937.18. Further, Ohioans are paying premiums for coverage that does not exist. For exclusions to apply, insurance carriers should be required to clearly and succinctly articulate the exclusions to put insureds on notice that UM will be denied. Otherwise, Ohioans will not be aware that coverage does not exist until the insurance carrier has denied the claim and it is too late to secure insurance coverage.

STATEMENT OF THE CASE AND FACTS

Appellant commenced this action seeking payment of UM benefits from American Select Insurance Company ("American Select") on December 29, 2004. Appellee, American Select, timely answered the Complaint. Appellee filed a Motion for Summary Judgment on December 7, 2005 and Appellant timely replied on January 12, 2006. On February 1, 2006, the trial court issued its Entry Granting Defendant American Select Insurance Company's Motion for Summary Judgment. An Entry of Final Judgment as to American Select Insurance Company was entered on February 24, 2006.

On March 22, 2006, Appellant filed her Notice of Appeal with the First District Court of Appeals. On December 13, 2006, the First District Court of Appeals

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affirmed the judgment of the trial court, stating that American Select was not required to provide UM coverage benefits to Appellant. (Appx. 1)

On January 2, 2003, Ms. Luetzow was a passenger in a 2001 Chevrolet pick-up truck being driven by her husband at the time, Gregory Luetzow, when they were involved in a traumatic, single car crash. As a result of the crash, Ms. Luetzow sustained severe and permanent injuries.

At the time of the collision, Ms. Luetzow was an insured under a personal auto policy issued by American Select, policy number NSA 1793800. Her personal auto policy contained liability and UM limits in the amount of $50,000 per person/$100,000 per collision. Vehicles specifically identified in the policy included Ms. Luetzow's 2001 Chevrolet Silverado pick-up truck, which was involved in the crash. For this coverage, Ms. Luetzow paid a total term premium of $1,180.00.

It is undisputed that Ms. Luetzow is an insured under the policy. The dispute arises over exclusions in the policy that in fact would make coverage illusory. Mr. and Ms. Luetzow paid premiums for liability coverage benefits that she cannot collect, because her husband was driving the vehicle in which she was injured. The exclusion is known as American Select's intra-family exclusion for liability coverage.

So, with no liability coverage, one might then expect to make a UM claim. After all, Appellant paid premiums for UM benefits. The Trial Court and Court of Appeals, agreeing with Appellee say, "No." There is yet another exclusion contained within the UM coverage section of the policy that the Courts mistakenly interpreted excluding Appellant from coverage. Despite paying for liability and UM coverages,

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Appellant is left with no coverage. Ms. Luetzow was evidently paying for the illusion of insurance coverage.

ARGUMENT IN SUPPORT OF PROPOSITION OF LAW

Proposition of Law No. 1:

> **Where liability coverage is denied under a personal automobile insurance policy and the uninsured motorist coverage under the policy is not specifically excluded, then the insured is entitled to uninsured motorist benefits under the policy.**

The decision by the First Appellate District Court in this case is in direct conflict with the decisions in its own district, as well as other districts. In its decision, the Appellate Court cited *Kelly v. Auto-Owners Insurance Co.*, Hamilton App. No. C-050450, 2006-Ohio-3599 and *Robson v. Allstate* (September 18, 2001), Delaware App. No. 01CAE03007. (Holding that the 2001 amendments to R.C. § 3937.18 allow UM policies to include any terms and conditions precluding coverage, so long as the circumstances are specified in the policy.) The issue for this Court to decide is whether an insured can reach coverage under her UM policy, where there is no specific exclusion to such coverage.

Liability coverage was denied to Appellant due to an intra-family exclusion contained within the American Select policy. On page 4 of Appellant's American Select policy it states:

> **We** do not provide liability coverage for any **insured**:
>
> * * *
>
> 9. for **bodily injury** to **you** or any **family member**.

Appellant and her husband were named insureds under the policy, and as the lower Courts found, Appellant meets the family member definition in the policy. She

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is also a named insured. As such, she is precluded from reaching liability coverage. Because liability coverage is not afforded, Appellant logically seeks UM coverage under her American Select policy.

The lower Courts mistakenly found that the vehicle in which Appellant was a passenger was a covered auto for which liability coverage was provided under the American Select policy, and therefore Appellant is excluded from reaching UM benefits. However, contrary to their findings, **no** liability coverage was provided to Appellant under the American Select policy. In fact, liability coverage was **denied.** Under the policy, an uninsured motor vehicle is defined as:

> **"Uninsured motor vehicle"** means a land motor vehicle:
>
> * * *
>
> **(3)** to which a liability bond or policy applies at the time of the accident, but the bonding or insuring company denies coverage, or is or becomes insolvent.

Here a liability policy applied at the time of the accident, but the insuring company **denied** coverage. According to American Select's definition of uninsured motor vehicle, Appellant's vehicle satisfies the definition.

Next, the lower Courts erroneously rely on an exclusion in the uninsured motorist portion of the policy to preclude Appellant from reaching coverage. The policy states:

> However, **uninsured motor vehicle** does not include any vehicle or equipment:
>
> * * *
>
> **(3)** that is a **covered automobile for which coverage is provided** under Part I of this policy.

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While the pick-up truck in this case was specifically identified in the policy and insured under Part I (liability coverage) of the American Select policy, the critical distinction is that **coverage is not being provided**. Liability coverage was **denied**. Because liability coverage was denied, Appellant is entitled to UM coverage for which she has paid. Any other construction of this situation would result in Appellant paying for illusory coverage.

The First District Court of Appeals cites its own decision in *Kelly v. Auto-Owners Insurance Co.*, Hamilton App. No. C-050450, 2006-Ohio-3599, in support of their decision that UM coverage should be denied. In *Kelly*, the First District held that insurers are not required to pay UM benefits where the policy offering coverage includes terms and conditions precluding coverage, as long as the circumstances are specified in the policy. *Id.* at syllabus. In *Kelly*, the policy stated that UM coverage did not apply "to bodily injury caused by an automobile operated by a person excluded from coverage for bodily injury liability under the policy." *Id.* ¶ 14. The policy in this case states, an "uninsured motor vehicle" is one "that is a covered automobile for which coverage is provided under Part I of this policy," which is different than the language in *Kelly*. The language in *Kelly* would preclude the Appellant from recovering, as there would be no UM coverage for those excluded from bodily injury liability coverage. However, in the American Select policy, the language only excludes UM coverage for automobiles provided with coverage under the liability part of the policy. There is no specific language, as required by R. C. §3937.18, excluding anything other than automobiles which are provided coverage under Part I of the policy. Therefore, this case is easily be distinguishable from *Kelly*.

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Further, Ohio Courts have consistently held that where exceptions, qualifications, or exemptions are included in an insurance contract, a general presumption arises to the effect that which is not clearly excluded is included. *Moorman v. Prudential Ins. Co. of America* (1983), 4 Ohio St. 3d 20, 445 N.E.2d 1122; *Boughan v. Nationwide Prop. & Casualty Co.*, Allen App. No. 1-04-57, 2005-Ohio-244, *Peoples Building and Loan Co. v. Safeco Title and Ins. Co.*(July 5, 1988), Montgomery App. No. 10569.

CONCLUSION

For the reasons discussed above, this case involves matters of public and great general interest. The Appellant requests that this Court grant jurisdiction and allow this case so that the important issues can be reviewed on the merits.

Respectfully submitted,

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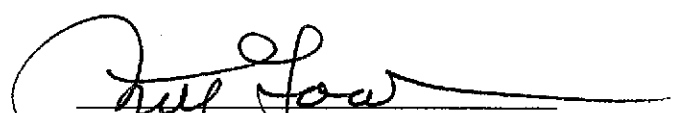
Attorneys & Counselors At Law



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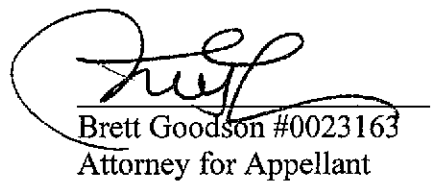
CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Memorandum in Support of Jurisdiction was sent by ordinary U.S. mail service to Michelle L. Donoghue, attorney for American Select, at 105 East Fourth Street, Suite 140, Cincinnati, Ohio 45202 on this 19 day of January, 2007.



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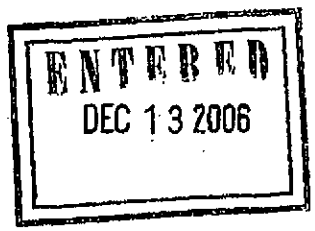
IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

KAREN ANN LUETZOW,	:	APPEAL NO. C-060259 TRIAL NO. A-0410397
Plaintiff-Appellant,	:	*JUDGMENT ENTRY.*
vs.	:	
AMERICAN SELECT INSURANCE COMPANY,	:	
Defendant-Appellee.	:	



We consider this appeal on the accelerated calendar, and this judgment entry is not an opinion of the court. See S.Ct.R.Rep.Op. 3(A), App.R. 11.1(E), and Loc.R. 12.

Plaintiff-appellant, Karen Ann Luetzow, appeals the summary judgment entered by the Hamilton County Court of Common Pleas in favor of defendant-appellee, American Select Insurance Company ("American"), in a declaratory-judgment action.

Luetzow was injured in a one-vehicle accident in which her husband was driving the couple's pickup truck. The truck was a "covered automobile" under a policy issued by American, but the liability portion of the policy provided that there was no coverage for bodily injury to a family member of the insured.

Luetzow conceded that this "intrafamily" provision of the liability policy precluded coverage for her injuries, so she sought coverage under the policy's uninsured/underinsured-motorist ("UM/UIM") provisions.

The relevant UM/UIM provision stated that the term "uninsured motor vehicle" did not include a vehicle "that is a covered automobile for which coverage is provided under Part I of this policy."

American filed a motion for summary judgment, arguing that because the pickup truck was a "covered automobile" under the policy, there was no UM/UIM coverage. The trial court granted American's motion.

In a single assignment of error, Luetzow now argues that the trial court erred in granting summary judgment in American's favor.

Under Civ.R. 56(C), a motion for summary judgment may be granted only when no genuine issue of material fact remains to be litigated, the moving party is entitled to judgment as a matter of law, and it appears from the evidence that reasonable minds can come to but one conclusion, and with the evidence construed most strongly in favor of the nonmoving party, that conclusion is adverse to that party.[1] This court reviews the granting of summary judgment de novo.[2]

Here, there is no dispute about the material facts. The parties agree that there remains only the legal issue whether there was coverage under the UM/UIM provisions of the policy.

We agree with the trial court that there was no coverage. It was undisputed that the pickup truck involved in the accident was a covered vehicle under Part I of the policy. Although Luetzow argues that the truck was uninsured because of the intrafamily exclusion, that exclusion did not render the truck an uninsured vehicle; it merely meant that coverage was not applicable under the facts of this case.

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[1] See *State ex rel. Howard v. Ferreri*, 70 Ohio St.3d 587, 589, 1994-Ohio-130, 639 N.E.2d 1189.
[2] *Jorg v. Cincinnati Black United Front*, 153 Ohio App.3d 258, 2003-Ohio-3668, 792 N.E.2d 781, at ¶6.

As this court has recently observed, it would be anomalous for a policy to preclude liability coverage under an intrafamily exclusion, only to provide UM/UIM coverage on the basis that the vehicle was uninsured.[3]

We also reject Luetzow's argument that the denial of UM/UIM coverage in this case rendered the policy's coverage illusory. The policy covered those accidents that did not involve family members of the insured and its coverage was therefore not illusory.

Finally, we find no merit in Luetzow's argument that the current version of R.C. 3937.18 mandated UM/UIM coverage in this case. The current version of the statute *removed* restrictions on an insurer's ability to deny UM/UIM coverage,[4] and Luetzow has not cited any provision of the amended statute that would have prevented the denial of coverage in this case. We overrule the assignment of error and affirm the judgment of the trial court.

Further, a certified copy of this Judgment Entry shall constitute the mandate, which shall be sent to the trial court under App.R. 27. Costs shall be taxed under App.R. 24.

HILDEBRANDT, P.J., SUNDERMANN and WINKLER, JJ.

RALPH WINKLER, retired, from the First Appellate District, sitting by assignment.

To the Clerk:

Enter upon the Journal of the Court on December 13, 2006

per order of the Court _____.
Presiding Judge

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[3] See *Kelly v. Auto-Owners Ins. Co.*, 1st Dist. No. C-050450, 2006-Ohio-3599, at ¶20, citing *Robinson v. Allstate Ins. Co.*, (Sept. 18, 2001), 5th Dist. No. 01CAE03007.
[4] Id. at ¶12.